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IN THE
COURT OF APPEALS OF INDIANA

DONALD E. SPENCE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0702-CR-86
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Kevin O'Reilly, Temporary Judge
Cause No. 79D02-0506-FC-57

August 8, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Donald E. Spence appeals his convictions and sentence for Carrying a Handgun without a License by a Convicted Felon, a Class C felony,[1] Possession of a Schedule IV Controlled Substance, a Class D felony,[2] Operating a Vehicle While Intoxicated ("OWI") While Having a Prior Conviction for Operating While Intoxicated, a Class D felony,[3] and his adjudication as an habitual substance offender.[4] We affirm.

Issues

Spence raises three issues on appeal, which we re-state as follows:

(1) Whether there was sufficient evidence to support Spence's conviction for OWI;

(2) Whether the trial court abused its discretion by admitting certified records of prior convictions; and

(3) Whether the trial court erred by imposing an aggravated sentence based upon findings made without a jury.

Facts and Procedural History

In June of 2005, Lafayette Police Department Officer Joseph Clyde ("Officer Clyde") observed Spence staggering out of a bar. He almost tripped and fell over. As Spence approached his truck, Officer Clyde turned on his car's emergency lights. Spence backed his truck out of his parking spot and idled forward for one hundred feet and parked in another spot. As Officer Clyde approached, Spence reached quickly toward his waist. Concerned, Officer Clyde ordered Spence to step out of the truck. Spence appeared very unsteady, stared

[1] Ind. Code § 35-47-2-23(c).
[2] Ind. Code § 35-48-4-7(a).
[3] Ind. Code § 9-30-5-3.

into the distance, and spoke in a very slow, slurred manner. His eyes were red and watery and his breath smelled of alcohol. Because Spence "almost fell down every time he walked," Officer Clyde had to help him walk. Transcript at 63. The officer searched Spence, finding a bag containing prescription pills. Another officer searched Spence's truck, finding a handgun. Further investigation revealed that Spence lacked a license for the handgun and that the pills were three different controlled substances, clonazepam, alprazolam, and diazepam, for which a prescription is required. Spence presented no evidence at all and therefore did not establish that he had a prescription for the controlled substances.

The same day, the State charged Spence with Carrying a Handgun by a Convicted Felon, Possession of a Schedule IV Controlled Substance, Operating While Intoxicated, and Operating a Vehicle While Intoxicated While Having a Prior Conviction for Operating While Intoxicated. In addition, the State sought to have Spence adjudicated as an Habitual Substance Offender.

The jury found Spence guilty as charged in all four counts and found him to be an Habitual Substance Offender.[5] At sentencing,[6] the trial court found aggravating circumstances in Spence's criminal history, the fact that he was on probation at the time of the instant offense, and "there have been attempts at rehabilitation." Appendix at 89. As mitigating circumstances, the trial court found that Spence's imprisonment would result in a hardship on his family and that he had family support. The trial court found that the

[4] Ind. Code § 35-50-2-10.
[5] Spence failed to appear for his two-day trial.
[6] Spence appeared for sentencing.

aggravating circumstances outweighed the mitigating circumstances and sentenced Spence to aggravated terms of imprisonment as follows: six years for Carrying a Handgun by a Convicted Felon, three years for Possession of a Controlled Substance, and three years for Operating While Intoxicated While Having a Prior Conviction for Operating While Intoxicated.[7] Pursuant to Spence's adjudication as an Habitual Substance Offender, the trial court enhanced by three years the term for the controlled-substance-possession conviction. Finally, the trial court ordered the terms to run consecutively, for a total aggregate sentence of fifteen years in prison. Spence now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

On appeal, Spence argues that the State failed to present sufficient evidence that he operated a vehicle while intoxicated. Our standard of review when considering the sufficiency of the evidence is well settled. We will not reweigh the evidence or assess the credibility of witnesses. Robinson v. State, 699 N.E.2d 1146, 1148 (Ind. 1998). Rather, we consider only the evidence that supports the verdict and draw all reasonable inferences from that evidence. Id. We will uphold a conviction if there is substantial evidence of probative value from which a jury could have found the defendant guilty beyond a reasonable doubt. Id.

"Intoxicated" means being under the influence of alcohol, or other substances, "so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties." Ind. Code § 9-13-2-86(1). Operating a vehicle while intoxicated is

[7] The trial court did not enter judgment of conviction on Count III, Operating a Vehicle While Intoxicated.

prohibited conduct. Ind. Code § 9-30-5-2(a).[8] To do so having been convicted of OWI less than five years earlier constitutes a Class D felony. Ind. Code § 9-30-5-3(1).

Spence left a bar, barely able to walk. Despite emergency lights displayed by a police car in the same parking lot, Spence decided to back his truck out of his parking spot and to drive forward. He slurred his words, appearing and smelling drunk. The State presented sufficient evidence to establish that Spence was intoxicated.

II. Admission of Certified Records

On appeal, Spence argues that the trial court abused its discretion during the adjudication phase by admitting into evidence certified records of past convictions, pertinent to the enhancements charged in this case. Carrying a Handgun without a License constitutes a Class A misdemeanor. Ind. Code § 35-47-2-1(a). When committed by someone convicted of a felony within fifteen years, however, the offense is a Class C felony. Ind. Code § 35-47-2-23(c)(2)(B). Accordingly, the State had to prove that Spence had been previously convicted of an unrelated felony. Similarly, the State's OWI and Habitual-Substance-Offender allegations required respectively proof of an OWI conviction five years prior to the instant offense, and proof of two prior unrelated substance-offense convictions. Ind. Code § 9-30-5-3(1); Ind. Code § 35-50-2-10(b).

Rulings on the admission of evidence are subject to appellate review for abuse of discretion. McHenry v. State, 820 N.E.2d 124, 128 (Ind. 2005). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the

[8] The level of punishment for OWI increases where it is committed in a manner that endangers a person. Ind. Code § 9-30-5-2(b). Contrary to Spence's suggestion, however, this is irrelevant to the allegation that he

determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401.

Spence challenges the admission of five documents, State's Exhibits Thirteen to Seventeen. Appellant's Brief at 4, 5. The records had been certified by the Bureau of Motor Vehicles and two county court clerks between 2000 and 2005. They evidenced an OWI conviction in 2001 and felonious OWI convictions in 1989 and 1993; as well as one felonious substance-offense conviction in 2001, and two misdemeanor substance-offense convictions in 1998. On appeal, Spence asserts that the State had the burden of proving that "the convictions had been unchanged since the certification." Id. at 11. Our Supreme Court addressed a similar question, holding that certified records were admissible even though certified by a clerk who no longer held that office. Kimp v. State, 546 N.E.2d 1193, 1197 (Ind. 1989), trans. denied. The Kimp Court noted that the defendant did not challenge the propriety of the certification. The same is true here. The trial court did not abuse its discretion in admitting the certified records.

III. Sentencing

Spence argues that the Sixth Amendment and the U.S. Supreme Court case of Blakely v. Washington, 542 U.S. 296 (2004), required a jury, rather than the trial court, to make findings supporting the imposition of an aggravated sentence, even for conduct, like his, occurring after April 25, 2005, the effective date of Indiana's advisory sentencing statute. Our Supreme Court held recently to the contrary.

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committed OWI having been convicted of another OWI less than five years earlier. Ind. Code § 9-30-5-3(1).

> . . . Indiana's new sentencing statutes apparently were enacted to resolve the Sixth Amendment problem Blakely presented. By eliminating fixed terms, the Legislature created a regime in which there is no longer a maximum sentence a judge "may impose without any additional findings." And this is so because for Blakely purposes the maximum sentence is now the upper statutory limit. As a result, even with judicial findings of aggravating circumstances, it is now impossible to "increase[ ]. . . the penalty for a crime beyond the prescribed statutory maximum."

Anglemyer v. State, 868 N.E.2d 482, 489 (Ind. 2007) (quoting Blakely, 542 U.S. at 301, 304 and Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

Conclusion

There was sufficient evidence to support the State's charge that Spence was intoxicated. The trial court did not abuse its discretion in admitting into evidence certified records of prior convictions. Finally, the Sixth Amendment did not prohibit the trial court from imposing an aggravated sentence based upon findings made without a jury.

Affirmed.

BAKER, C.J., and VAIDIK, J., concur.